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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 239

NORTON ANTHONY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–3a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who is indicted by a grand jury composed, in part, of government employees is entitled to dismissal of the indictment or a hearing

on the basis of general allegations that such grand jurors are biased in cases involving Communism.

2. Whether an indictment charging contempt of Congress must state the subject under inquiry and the relationship of the questions asked to that subject.

3. Whether petitioner stated his refusal to answer any question on Communism at the start of the hearing and therefore could not be tried for later refusing to answer specific questions on this subject.

4. Whether the trial court properly held that, as a matter of law, the subcommittee was properly constituted.

5. Whether the trial court erred (a) in holding, as matters of law, that the inquiry was for a legislative purpose and that the questions in issue were pertinent to that inquiry, or (b) in its instructions to the jury.

STATUTE INVOLVED

The statute involved is 2 U.S.C. 192, which appears at page 4 of the petition.

STATEMENT

Petitioner was indicted on sixteen counts, each of which charged him with refusing to answer a different question put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives (J.A. 3-6). He was convicted on counts 2, 3, and 4[1] (J.A. 236-237), and sentenced to

[1] The trial court directed acquittal on the remaining counts after they were abandoned by the government because the subcommittee failed to order petitioner to answer these other questions after his initial refusal to answer (J.A. 185, 220).

thirty days' imprisonment and a fine of five hundred dollars on each count, with the imprisonment sentences to run concurrently (J.A. 40). On appeal, petitioner's conviction was affirmed[1] (Pet. App. 1a–3a).

The pertinent facts may be summarized as follows:

Petitioner was called on September 15, 1954, before a subcommittee of the House Committee on Un-American Activities holding hearings in Dayton, Ohio, as part of their investigation into Communist activity in the Dayton area (J.A. 84–85).[2] Although the subcommittee conducting the Dayton hearings was composed of three members, only the chairman was present when petitioner appeared (J.A. 85, 149). Counsel for the subcommittee testified that petitioner was called, despite the fact that a quorum was not present and the subcommittee was not a validly operating subcommittee, because there was some prospect of petitioner's being a "cooperative" witness (J.A. 153).

Petitioner was not, however, such a witness. He claimed a First Amendment privilege when asked any questions relating to Communism and its specific activities then under investigation (J.A. 85–87). Upon the petitioner's refusal to answer such questions, counsel for the Committee excused the witness (J.A. 87–

[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after the decision of this Court in *Barenblatt* v. *United States*, 360 U.S. 109. See the government's Br. in Opp. in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

[2] A full statement of the purposes of these hearings is provided in Government Exhibit 3, set forth at J.A. 51–57.

88). Though the witness was not kept under subpoena (J.A. 88), the intention of counsel was to report to the Committee the other questions to be asked petitioner and to ask for a decision as to whether or not petitioner should be recalled (J.A. 88).

Committee counsel thereafter reported to the Committee that he felt that petitioner had been influenced at Dayton by the fact that his appearance was not before a legally constituted subcommittee and that he might cooperate if called before the Committee in Washington (J.A. 158). Moreover, petitioner's refusal to testify left a void, or, as counsel for the Committee characterized it, a "missing link" (J.A. 157, 176) in the testimony received from other witnesses during the Dayton hearings (J.A. 157, 159–160). The testimony already received established two areas of Communist activity, the connection between which would provide a fuller explanation of the purposes and methods of the Communist Party (J.A. 158–161). Therefore, the Committee was particularly anxious to obtain the information which it felt petitioner could supply (J.A. 157, 172, 176, 178–179), and he was subpoenaed to appear in Washington on November 17, 1954 (J.A. 44, 117).

Petitioner testified at Washington during an afternoon session conducted by a three-man subcommittee (J.A. 118, 123) which had been appointed during the noon recess by the Committee chairman (J.A. 117–118, 120). Notice of the appointment, which the chairman had made by telephone (J.A. 120), was entered in the record of the hearings at the beginning of the session at which petitioner testified (J.A. 168;

G. Ex. 6), and announcement of this fact was made at the hearing (J.A. 168). At no time during the course of the hearing did petitioner object to the composition or appointment of the subcommittee before which he appeared (J.A. 169–185).

Petitioner was questioned concerning the activities about which he had been interrogated in Dayton (J.A. 169–185). He persisted in his refusal to answer the Committee counsel's questions concerning his knowledge of the Communist activities being investigated and invoked the First Amendment as to each such question (see, *e.g.*, J.A. 174, 177). The questions he refused to answer included whether he joined the Communist Party in the mid-nineteen-forties (count two) (J.A. 178–179); whether Herbert Reed had anything to do with his entering the party (count three) (J.A. 180); and whether he had any knowledge of a party group in Yellow Springs (count four) (J.A. 182–183). Despite explanation of the importance of his testimony in the investigation of Communist activities at Antioch College (J.A. 172–173, 176–180) and rejection of his legal position (J.A. 175, 181), petitioner continued his refusal to answer these questions after being urged (J.A. 175, 181) and, finally, directed (J.A. 179, 180, 183) to answer.

ARGUMENT

1. Petitioner claims (Pet. 14–15) that the indictment should have been dismissed due to the possible bias of thirteen members of the grand jury who were employees of the Federal Government or District of Columbia, or that a hearing should have been granted

on this issue.[4] This contention is without substance.

The grand jury is a purely accusatory body which does not decide the question of guilt or innocence, but merely whether the defendant should be remanded for trial. *Hale* v. *Henkel*, 201 U.S. 43, 65. This has led to the traditional and continued reluctance of the courts to scrutinize grand jury proceedings for at least two reasons. First, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding which determines his guilt or innocence. Second, if the courts allowed defendant to challenge various aspects of the grand jury's actions, the result would be a second elaborate proceeding—besides the trial itself—before guilt or innocence was actually determined. This would mean considerable delay and inefficiency in the administration of criminal law. See Swan, C. J., in *United States* v. *Remington*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.[5]

Since the courts so rarely interfere with grand jury proceedings, the federal courts have held that bias in grand jurors does not invalidate an indictment unless, perhaps, the showing of bias in particular grand jurors is specific, individual, and strong. See, *e.g.*, *Cleveland* v. *United States*, 146 F. 2d 730, 732–733 (C.A. 10), affirmed, 329 U.S. 14; *United States* v.

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[4] Petitioner did not argue this issue in the court of appeals because of "the present state of the authorities in this Circuit" but purported to reserve the issue. The court did not advert to the question.

[5] These reasons are not applicable with regard to claims of bias in petit jurors. Therefore, *Morford* v. *United States*, 339 U.S. 258, and *Dennis* v. *United States*, 339 U.S. 162, on which petitioner relies (Pet. 14–15), do not sustain his position.

Remington, supra; *Quinn* v. *United States*, 203 F. 2d 20, 25 (C.A.D.C.), reversed on other grounds, 349 U.S. 155; *Emspak* v. *United States*, 203 F. 2d 54, 56, 58–60 (C.A.D.C.), reversed on other grounds, 349 U.S. 190; *United States* v. *Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.); *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D.N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 300–301 (N.D. Calif.).* And in *Dennis* v. *United States*, 339 U.S. 162, 168, 172, this Court indicated that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary before even a petit juror could be disqualified. Similarly, a defendant is not entitled to a hearing with respect to the grand jury unless, at the least, his motion and accompanying affidavit allege specific facts which, if proved, would constitute the strong showing of bias

* The decisions of this Court in which indictments have been invalidated for reasons relating to the composition of the grand jury have all involved the systematic exclusion from the panel of entire classes of persons, such as women (*Ballard* v. *United States*, 329 U.S. 187), and Negroes (*Cassell* v. *Texas*, 339 U.S. 282). These cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore are not proper grand juries. It is plain that it is not merely general prejudice against the accused's class that is involved, because the Court has chosen as its remedy not to require that all persons prejudiced against the class be excluded or even that the excluded class must be represented on every grand jury returning an indictment against a member of that class, but only to insure that the selection of the panels be without arbitrary exclusion. It has never been suggested by the Court that an accused might be entitled to have an entire class systematically excluded from the panel or a particular jury—the precise claim petitioner makes here.

Dayton before moving to Yellow Springs in 1948; whether petitioner was in the Communist Party at any time prior to moving to Yellow Springs in 1948; and whether petitioner is a member of the Communist Party (JA 86-87). After these declinatures, Committee counsel announced: "I have no further questions" (JA 87); and petitioner was completely excused (JA 88).

Although the Subcommittee at Dayton had started with all three members present on the day of petitioner's appearance, there was only one member left and present by the time of petitioner's appearance to hear his testimony (JA 85; 149). Committee counsel was aware of this lack of a legal quorum during petitioner's appearance, and had it in mind when he broke off his questioning of petitioner (JA 88; 150).

Committee counsel testified at the trial. At the close of petitioner's appearance in Dayton, he had further questions and expected to get a Committee ruling as to recalling petitioner (JA 88). So he testified; although at Dayton he announced having no further questions, and permitted petitioner to be completely excused (JA 87-88). Committee counsel thought that petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November petitioner showed a desire to get in touch with a Committee staff member (JA 89). However, the subpoena was not served until after the making of the decision to subpoena petitioner for his appearance in Washington; and petitioner's desire for a conference was to change the stated time for his appearance (JA 90).

At the time of petitioner's appearance in Washington, the Chairman of the Committee group which heard him announced that the shortness of time allotted to the Dayton hearings had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (JA 93). However, three witnesses had testified at Dayton after petitioner had testified; and one of them was a volunteer witness, unexpected and uninvited, who was permitted to testify at his own request after the hearings had already been closed (JA 93-94).

Two witnesses at Dayton, other than petitioner, had declined to answer questions on a First Amendment claim of privilege. These declinatures were in the presence of a legal quorum. Neither witness was called to Washington for further testimony. Both were cited for contempt at Dayton and indicted there (JA 95-96). Petitioner was the only Dayton witness called for a further appearance at Washington; he was the only Dayton witness who claimed a First Amendment privilege in the absence of a legal quorum (JA 109).

At the Washington hearing, the petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (JA 91) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first question which concerned communism (JA 92). The taking of this stand by petitioner in Washington ended any hopes that he "might cooperate with the Committee" and answer questions concerning communism (JA 158). Immediately upon petitioner's general refusal at the outset to answer questions

concerning communism, the Chairman, Mr. Clardy, sought and obtained a specific disclaimer from petitioner of any reliance on the Fifth Amendment (JA 91-92); and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment (JA 4-6; 86-87; 92; and 169-185). It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive petitioner's declinature (JA 90).

Upon the foregoing facts, petitioner moved for a directed verdict on the ground that "the proof fails to show that in questioning defendant the Committee was pursuing a legislative purpose [but] rather, the proof shows that defendant was called to testify in order to punish him for contempt" (JA 28), and upon the further ground that "the proof shows that if defendant committed any crime of contempt, the crime was committed when, before any of the questions specified in the indictment, he made it clear that he was not going to answer any questions involving Communist Party membership or activities on his part" (JA 28). The motion was denied (JA 197). The specific request of petitioner for a charge to the jury which would submit the issue of whether petitioner was called to Washington for punishment or legislative aid was denied (JA 34-35). The Court informed the jury that as a matter of law the "inquiry was for a legislative purpose" (JA 225).

We turn to a summarization of the case on the two aspects (authority to appoint and action taken to appoint) of whether the three Congressmen, chaired by Mr. Clardy, before whom petitioner appeared in Washington were legally appointed as a Subcommittee

of the House Committee on Un-American Activities. The summary follows.

The Rules of the House of Representatives, applicable to the House Un-American Activities Committee, provide: "A Committee may adopt rules under which it will exercise its functions . . . and may appoint subcommittees" (JA 189). Committee counsel testified that there was no rule of the House on "who should be the one to appoint members of a subcommittee" (JA 146). The practice of the Committee was for the Chairman of the Committee to appoint subcommittees; and, in conformity with that practice, the Committee in January 1953 adopted a resolution authorizing the Chairman to appoint subcommittees (JA 190). So Committee counsel testified; but no resolution was offered. Neither the House nor the Committee has any rule with respect to the method in which the Chairman should appoint subcommittees (JA 189). The practice of the Chairman was to appoint subcommittees by personal interview or telephone.

Petitioner urged to no avail that the question of the authority of the Committee Chairman to appoint subcommittees was one of fact, and that hence the foregoing evidence should be heard by the jury (JA 139; 145; 204). The Court excluded the jury (JA 126; 139; 145); refused a specific request for a charge submitting the issue of the Chairman's authority to appoint subcommittees for jury determination (JA 33); and informed the jury as a matter of law that the Committee Chairman was authorized to appoint subcommittees, and could do so by telephone (JA 224).

The group before which petitioner appeared in Washington had Mr. Clardy as Chairman, with

Messrs. Scherer and Walter as ordinary members (JA 125-126; 168). All of the evidence on whether this Clardy group had been appointed as a subcommittee by the Chairman came from two Government witnesses, Messrs. Scherer and Tavener. In rejection of petitioner's view that all of his testimony should be passed on by the jury (JA 42-43; 44), Mr. Tavener, Committee counsel, testified both in and out of the presence of the jury. He testified that at an executive Committee hearing in August 1954, the Chairman appointed a subcommittee of *Congressman Scherer as Chairman* with Messrs. Clardy and Walter as ordinary members to hold hearings *at Dayton* at any time prior to *three weeks before the election in the beginning of November* (JA 161; 166). This was out of the presence of the jury (JA 167). In the presence of the jury (JA 167), Government counsel emphasized "Clardy," "Scherer" and "Walter" as the names of the three man group before whom petitioner appeared at Washington, and merely asked: "Are Congressmen Clardy, Scherer and Walter the same members of the Un-American Activities Committee which you state were appointed by Chairman Velde on August the 9th, 1954, at the time that the full committee authorized taking hearings?" To which Mr. Tavener simply answered: "They are, yes" (JA 168).

Mr. Scherer, a member of the group before which petitioner appeared at Washington in November 1954, testified on cross-examination that the Committee Chairman had telephoned him during the noon recess on the day of petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the

purpose of conducting the hearings that afternoon" (JA 120). On re-direct examination, Mr. Scherer, under the guidance of Government counsel, also testified that Mr. Clardy was to be Chairman of the subcommittee for the purpose of conducting the hearings that afternoon (JA 124).

Petitioner's motion for a directed verdict because of the lack of a sufficient showing of a properly constituted body (JA 27) was denied (JA 197). The Court in its own charge on this issue stated that the jury need only find that "the Chairman of the full committee had theretofore designated and appointed Representatives Clardy, Scherer and Walter as subcommittee for the purpose of conducting such hearings" (JA 226); and, further informed the jury that they could find such appointment either in the executive session of the Committee in August or by telephone on the day of petitioner's appearance (JA 228). In this way with Mr. Scherer testifying that he had been appointed by telephone on the day of petitioner's appearance to a subcommittee first stated by him to be with him as Chairman, and then stated by him to be with Mr. Clardy as Chairman, the trial judge permitted, indeed encouraged, the jury to find the appointment of the *Washington* subcommittee with *Clardy* as Chairman from Mr. Tavener's testimony of the August appointment of a subcommittee, although the jury was kept from hearing that the August appointment was of a Dayton subcommittee with *Scherer* as Chairman.

Throughout the trial petitioner advanced the view that where, as here (JA 19ff; 113ff; 132ff; 199ff; 244ff; and 247ff), the evidence on pertinency was not limited to the transcript of petitioner's appearance but con-

sisted also of the testimony of witnesses, the issue of pertinency was for the jury (JA 9; 139; 34; and 195). The District Court rejected this contention (JA 43; 187; and 195); and charged the jury that the questions asked of petitioner were pertinent as a matter of law (JA 224-225).

With respect to the total history of the Committee petitioner offered evidence to show its continued purpose of exposure of individuals rather than legislative purpose. The offer was denied (JA 211-212).

A jury charge was specifically requested to read:

> Where the facts proven to your satisfaction by the prosecution are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though the inference pointing to guilt may be equally weighty.

It was refused (JA 37; 209; 213ff).

On the jury's verdict of guilty as to Counts Two, Three, and Four, the Court sentenced petitioner on each of the three counts. The sentence on each count was thirty days' imprisonment and a fine of Five Hundred Dollars, "said sentences on Counts Two, Three and Four to run concurrently" (JA 40). The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The trial court's failure to dismiss the indictment or grant a hearing on the bias of the Government employees on the grand jury, sanctioned by the affirmance of petitioner's conviction, is probably in conflict with *Morford* v. *United States*, 339 U.S. 258, and appears to constitute a misapplication of *Dennis*

v. *United States*, 339 U.S. 162. *Dennis* rejected the disqualification of jurors merely because they were Government employees and a Government loyalty program had been in existence for three months. *Morford* by *per curiam* opinion reversed the affirmance of a conviction where petitioner had been denied an opportunity to show the actual biasing influence of such a program on Government employees. Your petitioner showed by the uncontradicted affidavits of experts that such employees, after seven years of the pressures of loyalty-security programs, are generally biased against a defendant in a case involving communism, and was denied the requested opportunity to prove further that the thirteen Government employee grand jurors in this case were actually biased against him. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Morford*, at p. 259, quoting from *Dennis*.

Morford and *Dennis* concerned petit jurors. But on the point here grand jurors should stand no differently; for, if they be biased, the Constitutional protection of a grand jury against the prosecutor's zealousness becomes meaningless ritual.

2. Whether an indictment for contempt should be required to state what subject was under inquiry and the relationship to that subject of the questions asked presents an important question of federal law which has not been but should be settled by this Court. Failure to specify the subject under inquiry and the pertinence of the questions is the standard practice of the Government with respect to contempt indictments. Such failure is seriously prejudicial to a defendant's right, made explicit in Rule 7(c) of the Federal Rules

of Criminal Procedure, to have "a plain, concise and definite written statement of the essential facts constituting the offense charged." See *Cole* v. *Arkansas*, 333 U.S. 196, 201; and *Kraus & Bros.* v. *United States*, 327 U.S. 614. Here, for example, petitioner throughout his trial was compelled to guess as to what subject under inquiry the grand jury had in mind, as the prosecutor introduced some sixty pages of testimony directed to showing at least fifteen different subjects as being the subject under inquiry.[2] Yet this Court has stated with respect to contempt prosecutions that "it [is] incumbent upon the United States to plead and show that the question pertained to some matter under investigation." See *Sinclair* v. *United States*, 279 U.S. 263, 296-297.

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[2] These included: Communist Party activities in the labor movement in industry, and educational institutions (JA 47); Communist participation in the Univis Lens Corporation strike (JA 48); Communist leadership in the United Electrical, Radio and Machine Workers of America (JA 48); The investigating and revealing of the Communist conspiracy (JA 52); Complaints and requests for an investigation from the Dayton-Yellow Springs area (JA 57); The identification of individual Communists (JA 58); The identification of petitioner by another witness as a member in the past of the Communist Party (JA 66); The identification by a witness called Strunk of a man called Herbert Reed as an officer in the Communist Party (JA 68); Legislative recommendations on the subject of capital punishment for peace time espionage, immunity for certain witnesses, the admissibility of wiretapping evidence, and the breaking of Communist Party control over certain labor unions (JA 80; 83); A legislative recommendation on the adoption of procedures to withdraw military commissions from those who claim the Fifth Amendment (JA 82-83); A legislative recommendation on the outlawing of the Communist Party (JA 83); A legislative recommendation on requiring Government contractors to make out an affidavit of nonmembership (JA 83); and Communist Party infiltration at Antioch College for the particular years between 1942 and 1945 (JA 154-157).

The affirmance by the Court of Appeals of the conviction of petitioner on an indictment which sheds no light on the subject under inquiry and pertinence is in conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Lamont*, 236 F.(2) 312. This precise question of the validity of such an indictment is now before the Court by way of its grant of certiorari in *Braden* v. *United States*, October Term, 1959, No. 779.

3. The Court below holds a number of rather plainly factual questions to be matters of law for the judge —ascertainment of the subject under inquiry; pertinence to that subject of the questions asked; whether appearance was compelled in order to punish or in aid of a legislative purpose; and the authority or lack of authority of a Committee Chairman to appoint subcommittees. How much invalid encroachment upon the right of a defendant in a contempt proceeding to a jury trial is thus involved is a question which should be delimited by this Court.

The Court of Appeals felt itself "constrained" by the decision of this Court in *Sinclair* v. *United States*, 279 U.S. 163, to hold that pertinence is a question of law for the trial judge, even though pertinence here rested largely on the probative value of the oral testimony of Government witnesses. In this aspect of its decision, the Court of Appeals has misapplied the *Sinclair* case, and is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Orman* v. *United States*, 207 F.(2) 148. The Third Circuit Court of Appeals sums up the matter succinctly in *Orman* at p. 155:

> Courts have said the question is one of law . . . But in *Sinclair* the Supreme Court explained that

> the "question of pertinency . . . was rightly decided by the Court as one of law. It *did not depend upon the probative value of evidence.*" [Emphasis added] In the instant case, however, evidence *aliunde* was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was one element of the criminal offense.

The precise question of pertinence for judge or jury is now before the Court by its grant of certiorari in *Braden* v. *United States*, October Term, 1959, No. 779.

The affirmance by the Court of Appeals of petitioner's conviction based on a conclusive presumption of legislative purpose, and its refusal to consider the evidence showing the purpose of the Subcommittee to have been punishment, appear to be inconsistent with the approach of this Court in its opinions in *McGrain* v. *Dougherty*, 273 U.S. 135, and *Sinclair* v. *United States*, 349 U.S. 155. In those cases, this Court carefully reviewed the record evidence before passing on charges of punishment rather than aid of legislation. See *McGrain* at pp. 179-180; and *Sinclair* at pp. 295ff. Similar, but not identical questions of punishment or legislative purpose are now before the Court by its grants of certiorari in *Wilkinson* v. *United States*, October Term, 1959, No. 703, and *Braden* v. *United States*, October Term, 1959, No. 779; and cf. the first question presented in *McPhaul* v. *United States*, October Term, 1959, No. 674, certiorari granted.

Finally, the failure of the Court of Appeals to reverse petitioner's conviction in this case where he had been denied a charge of priority of innocence over guilt as between equal inferences on close issues is

in conflict with the decision of the Second Circuit Court of Appeals in *Bechner* v. *United States,* 5 F.(2) 45.

4. In our day, we have witnessed many excesses by Congressional committees, sufficient to remind the writer of De Tocqueville's dictum that a hundred tyrants are no better than one. Many of the excesses are beyond the corrective powers of the Judiciary. But here we respectfully suggest that this Court can, and should correct an abuse of power, expressly permitted by the Court of Appeals, which leads to the one-man runaway subcommittee. This Court can, and should hold that Committee authority to its Chairman to appoint subcommittees without specification of the method must be held in law to be limited to a method of appointment more formal and definitive than a telephone call without any record made. Cf. *Ex Parte Frankfeld,* 32 F. Supp. 915, 916 (D.C.D.C., 1940). No less would seem to be required when the liberties and privileges of citizens of the United States are affected.

5. The decision of the Court of Appeals is in conflict with *Costello* v. *United States,* 198 F.(2) 200 (C.C.A. 2, 1952), cert. den. 344 U.S. 874, in the failure here to reverse petitioner's conviction because the contempt by him, if any, was committed when, before any of the indictment questions concerned with communism, he made it clear that he was not going to answer any such questions.

6. As has already been pointed out by petitioner, in *Braden* v. *United States,* October Term, 1959, No. 779, the court's decision in *Barenblatt* v. *United States,* 360 U.S. 109, considered much legislative history in delineating the scope of authority conferred

upon the Committee by H. Res. 5. But the Court did not pass upon whether H. Res. 5 as a criminal statute in conjunction with 2 U.S.C. 192, is sufficiently clear to a witness to avoid violation of the Fifth Amendment, in the light of *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, 458, which requires a criminal statute to be clear on its face. And see also, *Winters* v. *New York*, 333 U.S. 507.

7. On the question of whether, in the light of the total history of the House Committee on Un-American Activities, this Court should not reconsider its decision in *Barenblatt, supra*, we respectfully refer to and adopt the thorough and able argument and documentation of counsel for the petitioner in *Braden* v. *United States*, October Term, 1959, No. 779, petition, p. 16.

As we have noted, some but not all of the questions presented by this petition are now before the Court in *Braden, Wilkinson*, and *McPhaul*. Briefs on the merits have not yet been filed in those three cases. A grant of certiorari now in this case would, without unduly delaying decision in those three cases, provide an opportunity for one contemporaneous consideration and decision of all the important questions, conflicts, and misinterpretations of this Court's decisions which now require settlement by this Court for the guidance of the lower Federal Courts in contempt cases. Should the Court feel otherwise, we respectfully request that decision on our petition be withheld until the Court decides *Braden, Wilkinson*, and *McPhaul;* for our petition presents some questions identical with some of the questions presented in those three cases.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

JOSEPH A. FANELLI
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,529

NORTON ANTHONY RUSSELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 18, 1960

Mr. Joseph A. Fanelli, with whom *Mr. J. H. Krug* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, *Carl W. Belcher, Lewis Carroll* and *John D. Lane,* Assistant United States Attorneys, were on the brief, for appellee. *Mr. Harold D. Rhynedance, Jr.,* Assistant United States Attorney, also entered an appearance for appellee.

Before WASHINGTON, BASTIAN and BURGER, *Circuit Judges.*

WASHINGTON, *Circuit Judge:* This is a contempt of Congress case, under Section 192 of Title 2, United States Code (1958).

Appellant was convicted, after trial by jury, on three counts of an indictment charging him with refusal to answer certain questions propounded by a subcommittee of the Committee on Un-American Activities of the House of Representatives. This appeal followed.[1]

The first contention advanced by appellant is that he was subpoenaed to appear before the subcommittee in Washington, D. C., solely in order that he might be punished for contempt. He had declined to answer certain questions put to him by a member of the subcommittee at a hearing in Dayton, Ohio, and it seems agreed by all parties that this initial refusal could not have resulted in a contempt citation. But it does not follow that the subcommittee could not thereupon properly summon him to Washington to appear before a tribunal which was empowered to initiate proceedings for contempt, upon his continued refusal to answer. See *Flaxer* v. *United States*, 358 U.S. 147 at 151 (1958).

Other contentions advanced include these: that the trial court could not decide as a matter of law that the Chairman of the full committee could appoint subcommittees, or decide that such an appointment could properly be made by telephone. Appellant says these matters should have been left to the jury. But we think the legal questions raised were within the trial court's prerogative. The judge decided those questions, and we think he did so correctly. The jury was allowed to make the ultimate decision, under proper instructions, as to whether the defendant-appellant was summoned to appear before a properly-constituted subcommittee. Its verdict indicated that it found that he was, and the evidence was ample to justify its conclusions.

[1] The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13,464, Gojack v. United States, decided this day.

A further contention relates to the pertinency of the questions asked to the subject matter under inquiry. Appellant urges that this was not a question for the judge, but for the jury. We are constrained by the decision of the Supreme Court in *Sinclair* v. *United States*, 279 U.S. 263 (1929), and by our decision in *Keeney* v. *United States*, 94 U.S.App.D.C. 366, 218 F.2d 843 (1954), to say that the matter is for the judge to decide. The judge determined here that the questions were pertinent, and we find no ground on which to disagree.

For these reasons, the judgment of the District Court will be

Affirmed.